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Nos. 92-919, 92-968 and 92-969

In the Supreme Court of the United States

OCTOBER TERM, 1992

MORRIS J. EISEN, PETITIONER

v.

UNITED STATES OF AMERICA

GERALDINE G. MORGANTI AND DENNIS RELLA, PETITIONERS

v.

UNITED STATES OF AMERICA

JOSEPH P. NAPOLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

DAVID S. KRIS
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the government adequately established the state-law predicate offenses on which petitioners' racketeering convictions were based.

2. Whether the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, is unconstitutionally vague.

3. Whether mail fraud in violation of 18 U.S.C. 1341 (1988 & Supp. III 1991) constitutes a RICO predicate offense when the fraudulent scheme involves a violation of a state perjury statute that does not itself constitute a predicate offense.

4. Whether a defendant can "conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs through a pattern of racketeering activity" in violation of 18 U.S.C. 1962(c) without exercising control over the management or operation of the enterprise.

5. Whether the district court erred in responding to petitioners' claim that the jury would be influenced by media reports about actions one of petitioners' lawyers took in another case.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-919

MORRIS J. EISEN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 92-968

GERALDINE G. MORGANTI AND DENNIS RELLA, PETITIONERS

v.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-45a)[1] is reported at 974 F.2d 246.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1992. A petition for rehearing was denied on October 20, 1992. Pet. App. 46a. The petitions for a writ of certiorari were filed on November 27, 1992 (in No. 92-919) and December 7, 1992 (in Nos. 92-968 and 92-969). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a four-month jury trial in the United States District Court for the Eastern District of New York, petitioners Eisen, Morganti, and Napoli were convicted of racketeering and conspiracy to engage in racketeering, in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962(c) and (d) (RICO); petitioner Rella was convicted of conspiracy to commit racketeering offenses. Petitioner Eisen was sentenced to 57 months' imprisonment, fined $100,000, and ordered to forfeit $500,000 and to make restitution of $17,100. Petitioner Morganti was sentenced to 37 months' imprisonment, fined $25,000, and ordered to make restitution of $17,100. Petitioner

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[1] "Pet. App." refers to the appendix to the petition in No. 92-919.

Napoli was sentenced to 46 months' imprisonment, fined $75,000, and ordered to forfeit $30,000. Petitioner Rella was sentenced to 24 months' imprisonment. Gov't C.A. Br. 2. The court of appeals affirmed. Pet. App. 1a-45a.

1. Morris J. Eisen, P.C., was a Manhattan law firm that specialized in bringing personal injury suits on behalf of plaintiffs. The Eisen firm earned millions of dollars in contingency fees by bringing false personal injury suits, paying friendly witnesses to testify favorably and hostile witnesses not to testify at all, and creating false photographs, documents, and physical evidence of accidents for use before and during trial. Petitioner Eisen was the founder, sole shareholder, and principal attorney of the Eisen firm. Petitioner Napoli was associated with the firm in an "of counsel" capacity and was the firm's main trial attorney. Petitioner Morganti was the office administrator of the Eisen firm. Petitioner Rella was a private investigator affiliated with the firm. Pet. App. 3a-4a; see Gov't C.A. Br. 5-29.

2. A grand jury indicted petitioners for racketeering and conspiracy to engage in racketeering, in violation of 18 U.S.C. 1962(c) and (d). To establish the requisite "pattern of racketeering activity," the indictment alleged that petitioners had bribed witnesses, in violation of N.Y. Penal Law §§ 20.00 (1987) and 215.00 (McKinney 1975), and committed mail fraud, in violation of 18 U.S.C. 1341 (1988 & Supp. III 1991). Indictment 1-37. At trial, the government offered testimony of some of petitioners' former accomplices to establish the predicate racketeering acts. Petitioners submitted a proposed jury in-

struction articulating a New York rule that requires the prosecution to corroborate accomplice testimony used to prove serious offenses.[2] The court refused to give the proposed instruction. See 92-919 Pet. 10-12.

At the time of petitioners' trial, the government was engaged in the unrelated RICO prosecution of John Gotti, which also was pending in the United States District Court for the Eastern District of New York. While petitioners' jury was deliberating, the court in the Gotti prosecution heard argument on the government's motion to disqualify several of the defense attorneys in that case, including Gerald L. Shargel, who was at the same time representing petitioner Napoli in this case. When the government's disqualification motion became the subject of substantial media coverage, petitioner Napoli argued that the media coverage of his attorney in the Gotti prosecution would lead the jury in this case to associate him with the defendants in the Gotti prosecution. The district judge decided that the proper course was to advise each juror individually in chambers to avoid all news media reports over the coming weekend. Napoli's counsel objected to individual interviews and requested that the jury instead be sequestered. The judge denied the request but admonished the jury to avoid all news media reports over the weekend. The court set up a telephone line the jurors could call to receive news about events in the Persian Gulf. Pet. App. 38a-39a; see Gov't C.A. Br. 184-185.

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[2] See *United States* v. *Paone*, 782 F.2d 386, 393-394 (2d Cir.) (discussing the rule), certs. denied, 479 U.S. 882 (1986) and 483 U.S. 1019 (1987); 92-919 Pet. 11 n.2 (same).

After the jury convicted petitioners on the racketeering and racketeering conspiracy counts, the district court vacated petitioner Rella's substantive racketeering conviction because the racketeering acts underlying that conviction were not committed within the limitations period. Pet. App. 5a & n.1; Gov't C.A. Br. 2 & n.1.

3. The court of appeals affirmed. Pet. App. 1a-45a. The court specifically rejected eight of petitioners' claims, two of which are presented in these petitions. First, it concluded that mail fraud may serve as a RICO predicate offense even when the fraudulent scheme effectuated by the mailing involves a state-law perjury offense that would not itself constitute a predicate offense under RICO. *Id.* at 10a-11a. The court explained that "where, as here, a fraudulent scheme falls within the scope of the federal mail fraud statute and the other elements of RICO are established, use of the mail fraud offense as a RICO predicate act cannot be suspended simply because perjury is part of the means for perpetrating the fraud." *Id.* at 10a. Second, the court rejected petitioner Napoli's claim that the trial court erred in refusing to sequester the jury to protect it from publicity concerning his counsel's actions in the Gotti prosecution. *Id.* at 38a-41a. The court noted that the trial court admonished the jurors to avoid media reports of all kinds until the end of the trial. The court also noted that the allegations regarding counsel's conduct in the Gotti case did not concern the trial in this case. *Id.* at 40a. Finally, the court disposed of a number of petitioners' other claims by "find[ing] them to be without merit." *Id.* at 45a.

ARGUMENT

1. Petitioners' principal claim is that the bribery offenses that were used as predicate acts in their prosecutions were not "chargeable under State law" for purposes of 18 U.S.C. 1961(1)(A) (1988 & Supp. III 1991), and that the racketeering convictions resting on those offenses thus should be overturned. 92-919 Pet. 14-45; 92-968 Pet. 13-19; 92-969 Pet. 28-34. RICO proscribes participation in the conduct of an enterprise's affairs "through a pattern of racketeering activity." 18 U.S.C. 1962(c). Section 1961(1)(A), in turn, defines "racketeering activity" to include a variety of offenses "chargeable under State law." In this case, the government relied on state-law bribery offenses as some of the predicate acts of racketeering activity. The indictment cited N.Y. Penal Law §§ 20.00 (1987) and 215.00 (McKinney 1975), see, *e.g.*, Indictment 10, 18, and the district court properly instructed the jury that it could convict petitioners only if it found that the government had proved all of the elements of the offenses created by those provisions of New York law. Tr. 9114-9116.[3]

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[3] Because the government in this case proved all of the substantive elements of the state-law crimes it used as predicate offenses, petitioner Eisen accomplishes nothing by his extensive discussion (92-919 Pet. 14-45), joined by the other petitioners (see 92-968 Pet. 13-14; 92-969 Pet. 28-29), of the uncertainty in the lower courts regarding the circumstances in which the government must establish all the state-law elements to establish predicate offenses in prosecutions under RICO and the Travel Act, 18 U.S.C. 1952 (1988 & Supp. III 1991). Whether or not the government always must establish the precise elements of a particular state-law crime to use it as a predicate for a RICO offense, the convictions in this case were proper

Petitioners correctly point out that the district court declined to instruct the jury that the government was required to corroborate accomplice testimony that the government used to establish the predicate offenses in question. See 92-919 Pet. 10-11 & n.2; 92-968 Pet. 14-19. But the text of RICO plainly does not require such proof. Whether or not the government corroborated the testimony of the accomplices, the charged conduct that the government established at trial was "chargeable under State law," which is all that RICO requires. As the Second Circuit explained in *United States* v. *Paone*, 782 F.2d 386, cert. denied, 479 U.S. 882 (1986), the language of the statute makes it clear that "Congress did not intend to incorporate the various states' procedural and evidentiary rules into the RICO statute." 782 F.2d at 393.[4]

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because the government specifically established all the elements of the state-law bribery offenses at issue here. Petitioner Napoli's argument (92-969 Pet. 29-34) that the trial court did not properly instruct the jury regarding the "understanding" element of the state-law offenses was not raised in the court of appeals and is thus not properly before this Court. See Napoli C.A. Br. 49-60. Compare, *e.g.*, *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 603 (1991). In any event, Napoli's argument on that state-law question does not appear to raise a substantial question of federal law.

[4] See *United States* v. *Coonan*, 938 F.2d 1553, 1564 (2d Cir. 1991), cert. denied, 112 S. Ct. 1486 (1992); *United States* v. *Erwin*, 793 F.2d 656, 669 (5th Cir.), cert. denied, 479 U.S. 991 (1986); *United States* v. *Licavoli*, 725 F.2d 1040, 1047 (6th Cir.) ("The reference to state law in [RICO] is simply to define the wrongful conduct, and is not meant to incorporate state procedural law."), cert. denied, 467 U.S. 1252 (1984); *United*

Petitioners do not suggest that any other court would have required the prosecution to adhere to state-law procedural requirements like the corroboration requirement at issue in this case. In light of the clear intent of the RICO statute on the point, petitioners' claim does not merit review by this Court.

2. Petitioners also contend (92-919 Pet. 46-64; 92-968 Pet. 20; 92-969 Pet. 39) that RICO is unconstitutionally vague. That claim does not merit review.

Absent First Amendment considerations, a defendant may not challenge a statute for vagueness on the ground that there is some uncertainty regarding the full reach of the statute in marginal cases not before the court. Rather, the defendant must show that the statute is vague as applied to the particular conduct with which he is charged. See *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495 & n.7 (1982); *United States* v. *Powell*, 423 U.S. 87, 92 (1975). Thus, to sustain such a vagueness attack, the defendant must show that the statute fails to give a person of ordinary intelligence reasonable notice that his conduct is forbidden. See *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983); *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972).

Whatever ambiguity may exist at the margins of the RICO statute, it is clear that the statute is sufficiently precise to pass constitutional muster as applied in this case. First, contrary to the argument advanced by petitioner Eisen (92-919 Pet. 46-57), any

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States v. *Muskovsky*, 863 F.2d 1319, 1331 (7th Cir. 1988), cert. denied, 489 U.S. 1067 (1989).

person of ordinary intelligence would understand that the phrase "chargeable under State law" in 18 U.S.C. 1961(1)(A) (1988 & Supp. III 1991) includes the bribery offenses used as predicate offenses in this case. The jury was instructed that it could convict petitioners only if it found that they had violated all of the elements of a specific New York bribery statute. Assuming that the jury correctly found those facts to be true, it is plain that the conduct would have been "chargeable under State law." The fact that the government proved those violations in a federal court using federal procedural and evidentiary rules does not obscure the fact that the substantive conduct is forbidden by the New York statute and chargeable as a criminal offense under that statute.

The same is true of petitioner Eisen's challenge (92-919 Pet. 57-64) to RICO's "pattern" requirement, in which the other petitioners join (92-968 Pet. 20; 92-969 Pet. 39). That challenge relies primarily on the concurring opinion in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 254-256 (1989), in which Justice Scalia, joined by three other Justices, expressed doubt whether the RICO "pattern" element could withstand a constitutional vagueness challenge.[5] But even in the wake of *H.J. Inc.*, the courts of appeals uniformly have rejected vagueness challenges to RICO's "pattern" requirement. See *United States* v. *Coiro*, 922 F.2d 1008, 1016-1017 (2d Cir.), cert. denied, 111 S. Ct. 2826 (1991); *United States* v. *Woods*, 915 F.2d 854, 862-864 (3d Cir. 1990), cert. denied, 111 S.

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[5] The RICO statute states that a "pattern" requires "at least two acts of racketeering activity" within a particular ten-year period. 18 U.S.C. 1961(5).

Ct. 1413 (1991); *United States* v. *Pungitore*, 910 F.2d 1084, 1102-1105 (3d Cir. 1990), cert. denied, 111 S. Ct. 2009 (1991); *United States* v. *Angiulo*, 897 F.2d 1169, 1178-1180 (1st Cir.), cert. denied, 111 S. Ct. 130 (1990). In any event, the lengthy series of similar racketeering acts committed by the law firm under petitioners' direction[6] would satisfy any plausible definition of the "pattern" requirement. Petitioners' vagueness challenge to the "pattern" requirement thus has no merit.

3. Petitioners Morganti, Rella, and Napoli also argue (92-968 Pet. 21; 92-969 Pet. 35-38) that mail fraud does not constitute a valid predicate offense under RICO if the fraudulent scheme involves state-law perjury, because such a perjury offense would not itself constitute a RICO predicate offense.[7] That claim is meritless. Section 1961(1)(B) of Title 18 (1988 & Supp. III 1991) describes the conduct that constitutes "racketeering activity" for purposes of RICO; the definition includes "any act which is indictable under * * * section 1341 (relating to mail fraud)." Petitioners do not argue that the conduct in question was not indictable as a violation of 18 U.S.C.

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[6] For a summary of 16 of the racketeering acts, see Gov't C.A. Br. 7-29.

[7] Despite Napoli's arguments to the contrary (92-969 Pet. 36-37), it is irrelevant that one of the predicate acts of mail fraud was established with the aid of a stipulation. Napoli's counsel agreed to the stipulation and moved to withdraw it only after the jury had begun deliberating and had asked to review the evidence showing that the letter was mailed. Gov't C.A. Br. 156. The accuracy of the stipulation is not relevant to the question whether mail fraud is a valid RICO predicate offense when it is related to perjury.

1341 (1988 & Supp. III 1991); the plain language of the statute therefore rebuts their argument.[8] The fact that the purpose of the fraudulent scheme in question was to commit an act that would not itself have been a federal offense is irrelevant, just as it would have been irrelevant in a prosecution for the mail fraud itself. The justification for federal criminal sanctions in a RICO case of this sort, as in Section 1341, is Congress's judgment that fraudulent conduct involving the use of the mails interferes with distinctly federal interests not adequately addressed by state criminal sanctions. Moreover, petitioner Napoli acknowledges that apart from the Second Circuit's opinion in this case, "there is no authority concerning the use of mail fraud as a predicate act" in this context. 92-969 Pet. 37. Accordingly, petitioner's challenge to the mail fraud predicate offenses does not merit plenary review.

4. Napoli also claims (92-969 Pet. 15-20) that his RICO convictions are improper because he was merely of counsel to the Eisen firm, and "did not participate in the conduct of [the] enterprise's affairs within the meaning of [the] RICO statute," *id.* at 19. In particular, he contends that the phrase in 18 U.S.C. 1962(c) requiring the defendant "to conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs through a pattern of

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[8] As the court of appeals explained, "where, as here, a fraudulent scheme falls within the scope of the federal mail fraud statute and the other elements of RICO are established, use of the mail fraud offense as a RICO predicate act cannot be suspended simply because perjury is part of the means for perpetrating the fraud." Pet. App. 10a.

racketeering activity" can be satisfied only by proof that the defendant exercised control over the management or operation of the enterprise. Although the Court granted certiorari to consider that question in *Reves* v. *Ernst & Young*, 112 S. Ct. 1159 (1992) (No. 91-886), the petition need not be held pending disposition of that case, because Napoli did not raise the issue in the court of appeals. Accordingly, the claim is not properly before the Court, and petitioner Napoli would not be entitled to relief under any disposition of *Reves*. See, *e.g.*, *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 603 (1991).

5. Finally, petitioner Napoli claims (92-969 Pet. 21-27) that the trial court erred in its treatment of his claims relating to the publicity surrounding his counsel's behavior in the Gotti prosecution. After reviewing the record, the court of appeals summarized the relevant events as follows:

> When the problem was brought to Judge Sifton's attention on the Friday of the hearing in the *Gotti* case, the Judge determined that he would speak with each juror individually in chambers about avoiding all news media over the weekend. Defense counsel objected to individual interviews, arguing that it would magnify the problem, and instead requested sequestration. The Judge denied sequestration, but conducted a general inquiry of the jury, asking the jury to avoid all news media over the weekend and providing a means by which concerned jurors could call the Court to ascertain the progress of then pending events in the Persian Gulf without resort to the

> media. The jurors gave their general agreement that they could comply.

Pet. App. 39a. As that discussion makes clear, "[t]he steps taken to protect the integrity of the jury deliberations were adequate under the circumstances." *Ibid.* Although it might have been appropriate for the district court to have sequestered the jury, petitioner has identified no reason to believe that the trial court was required to proceed as petitioner suggested. The district court's exercise of its discretion in determining how to proceed in these particular circumstances does not present a legal question of general significance.[9]

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[9] To the extent petitioner claims that the trial court erred by declining to hold a hearing to evaluate his factual assertion that the jury disobeyed its instructions and was affected by the media coverage (92-969 Pet. 25-26), the claim is not properly before the Court, because Napoli did not raise that claim in the court of appeals. In that court he argued not that the trial court erred in declining to investigate his assertions of juror misconduct, but that he was entitled to a new trial based on his view that the trial judge should have sequestered the jury. See Napoli C.A. Br. 84-97. In any event, the question whether petitioner's allegations that the jurors disobeyed their instructions were of sufficient weight to require the trial judge to conduct a hearing is not one of general significance, but involves the application of well-settled principles of law to the facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

DAVID S. KRIS
Attorney

JANUARY 1993